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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

No. _____

SHARON MARGARET PAVLAK, Petitioner

v.

JOHN R. CHURCH, individually and in his official capacity as Chief of Police for the City of Boise; FRANK E. RICHARDSON, CLINTON BAYS and J. M. BERRY, individually and in their official capacities as officers of the City of Boise Police Department; KENT GREENWELL and DAVID ALLEN, individually and in their respective official capacities as Communications Supervisor and Assistant Communications Supervisor of the Public Works Department of the City of Boise; RYAN ARMBRUSTER, individually and in his official capacity as Assistant City Attorney for the City of Boise; RICHARD EARDLEY, individually and in his official

capacity as Mayor of the City of Boise; RALPH J. McADAMS, MARJORIE J. EWING, FRED L. KOPKE, BERNE K. JENSEN, JOY BUERSMEYER, and CORDELIA ONWEILER individually and in their official capacities as City Council member of the City of Boise; THE CITY OF BOISE, IDAHO, a municipal corporation, MYRL E. INGRAM, DENNIS BAIRD and JOHN PASCHKE, each individually and as agents and employees of MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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capacity as Mayor of the City of Boise; RALPH J. McADAMS, MARJORIE J. EWING, FRED L. KOPKE, BERNE K. JENSEN, JOY BUERSMEYER, and CORDELIA ONWEILER individually and in their official capacities as City Council member of the City of Boise; THE CITY OF BOISE, IDAHO, a municipal corporation, MYRL E. INGRAM, DENNIS BAIRD and JOHN PASCHKE, each individually and as agents and employees of MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sharon Margaret Pavlak, appellant, respectfully requests a Writ of Certiori issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit dated July 14, 1982.

QUESTION PRESENTED

After certification of a Rule 23(b)(3) of the Federal Rules of Procedure class is denied, the appellant, who was a member of the putative class, may claim that the statute of limitations was tolled pending the determination of the certification motion so that the Appellant may file an independant suit.

PARTIES TO THE PROCEEDINGS

The Parties to the procedings are those listed in the caption of this case.

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OPINION BELOW

The official report of the opinions of the courts below are as follows;

United States District Court for the District of Idaho, No. 80-1209.

United States Court of Appeals for the Ninth Circuit, Nos. 81-3109 and 81-3122 is reported at 681 F2d 617 (1982).

JURISDICTION

Judgment was entered in the United States Court of Appeals for the Ninth Circuit on July 14, 1982. Summary judgment was entered in by the United States District Court for the District of Idaho for the Appellees on January 20, 1981.

This Writ is being docketed in the Court in ninety (90) days from the entry of the judgment affirming the District Court below.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

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STATUTORY PROVISIONS AND RULES

The provisions of the law that were in effect at the time are as follows:

Federal Rules of Procedure Rule 23(b)(3).

Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: ....

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the

prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

UNITED STATES CODE, Title 18

§ 2520. Recovery of civil damages authorized.

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person --

(a) actual damages but not less than liquidated damages computed at the rate of $100. a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

UNITED STATES CODE, Title 42

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

UNITED STATES CODE, Title 42

§ 1985(3). Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all

persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

IDAHO CODE

§ 5-218. Statutory liabilities, trespass, trover, replevin, and fraud.

Within three (3) years:

1. An action upon a liability created by statute, other than a penalty or forfeiture. The cause of action in favor of the state of Idaho or any political subdivision thereof, upon a surety bond or undertaking provided for or required by statute shall not be deemed to have accrued against any surety on such bond or undertaking until the discovery by the state of Idaho or any political subdivision thereof of the facts constituting the liability.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake.

STATEMENT OF THE CASE

This is a proceeding for a claim for damages for invasion of the Appellant's right of privacy by the Appellees. The statutory basis for the claim is 42 U.S.C. sec. 1983, 1985(3), and 18 U.S.C. sec. 2520 (1976). The suit is for damages and other relief and unauthorized surveillance of the Appellant's private telephone conversations.

The Appellant brought an individual action to recover damages alleging

violation of federal and state law by secret electronic surveillance and interception of personal telephone conversations. In 1976 until 1977, an investigation was conducted by the Boise City Police Department, with the knowledge and consent of the Mayor and City Council of the City of Boise, Idaho. Boise City was aided and assisted in this 'wiretapping' by Mountain States Telephone & Telegraph.

The Appellant's frequent private telephone conversations were secretly recorded after interception and the contents disclosed to other persons by the Appellees. The "wiretapping" was conducted without any authorization required by the United States or Idaho law, nor with the consent or knowledge of the Appellent or persons to which she spoke on the telephone.

Three prior lawsuits arising out of the same facts were filed in the United

States District Court for the Idaho District, Woody vs. Church, Civil No. 77-1079, filed April 24 1977; Baker vs. Church, Civil No. 77-1082, filed April 26, 1977, a class action of which Appellant was an unnamed member of a putative class; and Cantrill vs. Church, Civil No. 79-1051, also a class action of which Appellant was an unnamed member of the putative class. Appellant had petitioned the District Court to participate as a class member in August, 1979 but did not move to intervene. The Appellent filed her own suit on August 11, 1980.

On May 25, 1980, the Complaint in Baker vs. Church, supra, was amended and Mountain States Telephone and Telegraph Company and three of the employees were added as party Defendants. On August 13, 1979, the District Court refused to certify the class, in part on the grounds that the numerosity requirement was lacking, the

Court further issued an order concerning intervention ruling that, "any and all motions for intervention in these consolidated cases must be filed on or before September 19, 1979 or any additional parties must file their own separate lawsuits."

The three consolidated suits were settled and dismissed before the Appellent filed her separate lawsuit on August 11, 1980.

The District Court ruled that the Appellent's Complaint was filed more than three years after her cause of action accrued and granted a Summary Judgment to the Appellees on the grounds that Idaho's three year statute of limitations barred the action, Idaho Code 5-218. The Court rejected Appellent's contention that, because she was a member of a putative class on whose behalf two earlier case action suits were commenced, the statute of limitation

was tolled during the pendency of these actions until the date class certification was denied. The District Court held that the pendency of a class action did not toll the limitation as to a class member who filed an independent lawsuit after class certification was denied.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court decision by a 2 to 1 majority.

The question sought to be reviewed before this Court was raised during the course of the proceedings in the District Court in opposition to a Motion to Dismiss, Amended Motion to Dismiss and Motion for Summary Judgment filed on behalf of the several Appellees. They were passed on by the District Court by reviewing Motions, Pleadings and Affidavits made in support or in opposition, and the District Court ruled that the Appellent's claims

were barred by the applicable statute of limitations. It is that decision which was appealed to the United States Court of Appeals for the Ninth Circuit, which reviewed the decision of the District Court.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE OTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 23(b)(3).

2. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The question presented is important for this Court's consideration of (1) the ruling defeats the meritorious claims in class action suits, and (2) because of the conflicts between the jurisdictions of the circuit courts and with decisions of the Supreme Court of the United States. The United States Circuit Court of Appeals' decision conflicts with the Supreme Court's decision in Eisen vs.

Carlisle and Jacquelin, 417 US 156 (1974) and with Parker vs. Crown Cork and Seal Company, Inc., 677 F2d 391 (4th Circuit 1982).

It was the lower court's position that the case of American Pipe and Construction Co vs. Utah, 414 USC 538 (1974) did not extend the tolling of the statute of limitations during the period that class certification was pending, so that an independent suit beyond the statute of limitations was not valid. In American Pipe, the Supreme Court held that "the commencement of the original class action tolls the running of the statute for all purported members of the class to make timely motions to intervene after the Court has found the suit inappropriate for class action status," Id. at 552-53.

The Ninth Circuit Court of Appeals held that a Plaintiff who fails to intervene, but instead files an individual

suit after past certification has been denied may be barred by a statute of limitations. The Ninth Circuit thus excluded from tolling the rule of American Pipe and Construction, Supra, putative class members who file separate lawsuits rather than intervene after denial of class certification.

The Court rejected the contention that Eisen vs. Carlisle and Jacquelin, Supra, extended the American Pipe rule.

In the case of Eisen, Supra, it was decided that notice must be sent to all members who could be reasonably identified (Rule 23 (B)(3)) in class actions because members of the class have a right to "opt out" of the class. The Court stated, "Id. 716n.13

In Eisen, Supra, class members who opt out do not run afoul of the statute of limitations, but the Appellent who elected to commence a separate action does.

The Appellent should be entitled to a tolling rule just as much as the Eisen class members. As stated by the dissenting opinion, "she was just as entitled to the Eisen class members, if not more so; at least Pavlak might have never filed a separate lawsuit had class been certified".

As also stated by the dissent, the Ninth Circuit apparently relies "on the distinction that in Eisen a separate action follows notice of class action, but whereas Pavlak's separate action follows the denial of class certification. . .I see nothing of significance in this distinction."

It is clear under the American Pipe rule as suggested by the dissent that "commencement of a class action tolls the applicable statute of limitations as to all members of the class" Eisen, 417 US @ 176n. 13 (emphasis added), as further stated by the District Court. All should mean all and not some class members as the

majority holds. "All" includes the putative class members in American Pipe who intervene after denial of class certification, the class members in Eisen who opt out after class certification and file separate actions, and putative class members like Pavlak who file separate actions after denial of class certification.

The majority's decision in the Ninth Circuit has been rejected in the case of Parker vs. Crown Cork and Seal Company, Inc., Supra. In that case the Plaintiff, a black male, was discharged by Defendants on July 15, 1977. He filed charges of discrimination with the EEOC alleging racial motivation, harrassment and termination. The issue in the case was whether or not the running of the 90 day statutory period pursuant to 42 USC, 2000e-5(f)(1), in which the Plaintiff could commence his private title seven action to redress allege racial discrimination employment was tolled during

the period that there was pending a class action in which the Plaintiff was a member of the putative class, but in which class certification was denied and the action subsequently dismissed. The Plaintiff took no action to intervene as a named Plaintiff in the class action, nor did he seek to file an individual suit until after the class certification was denied.

The Circuit Court held that the rule in American Pipe is not limited to interveners, but applies to all members of the class, or at least to those who "opt out", and presumably, file individual suits during the pendency of the class action.

In the District Courts we see similar problems of conflicts. For example, Green vs. United States Steel Corporation, 481 F Supp, 295, 299 (E.D.Pa 1979) with Gluck vs. Amicor, Inc., 487 F Supp. 608 614-15 (S.D.N.Y. 1980). The Second Circuit decided that the tolling

rule of American Pipe is limited to intervention, Aerneil vs. Ramsey, 550 F2d, 774, 782-83 (2nd Cir., 1977) and Stull vs. Bayard, 561 F2d 429, 433, (2nd Cir. 1977) Cert. denied, 434 US 1035 (1978).

In Parker the Court granted that in another context in the Seventh and Third Circuit, the tolling rule was claimed to be "broad. . . enough to include new suits as well as Motions to Intervene in the aborted class action". Sussman vs. Lincoln American Corporation, 587 F2d 866, 869 (7th Cir. 1978) Cert. denied, 445 US 942 (1980). In Re Fine Paper Litigations, 632 F2d 1081, 1987, (3rd Cir. 1980). This can easily be seen in that the Circuit courts and District courts are in disarray as to the proper interpretation of class actions and the tolling of statute of limitations.

This creates further problems for litigants whose cause of actions depends on which Circuits are involved as to whether

or not those claims become barred. It further depends on the interpretation of the Circuit Court or District Court makes on the Supreme Court ruling. One set of courts goes one way and the other set goes another way, thus, destroying uniformity in the appication of federal law in the United States.

In Parker, the Court's rationale in interpreting American Pipe is decidedly better than that submitted by the Ninth Circuit. The Court held "that American Pipe should be read to toll limitation with respect to new suits, as well as motions to intervene. The rationale of any statute of limitations is to put a defendant on notice of a claim with reasonable promptness so that the defense evidence is not lost, memories have not faded and witnesses have not disappeared." Those purposes are fully achieved so that the Defendant has "sufficient information within the statutory per-

iod to timely apprise (it). . . of the nature and scope of the perspective litigation, Cross vs. Pittsburg National Bank, 526 F2d 1083, 1097, n. 19 (3rd Cir. 1975)."

The Court further said that interventions should not be barred by the statute of limitations, as the defendant has the knowledge of the claim within the statutory period of time to apprise the Defendant of the prospective litigation. It is exalting form over substance to say that intervention should be permitted but not institution of a new suit. The Court further noted that "such a rule would encourage the filing of individual suits or intervention by members of the putative class while the issue of class certification was unresolved, adding additional burden and expense to the Defendant." If the rule of American Pipe is limited to intervenors, there might be the inequitable

result allowing some putative members of the class to obtain adjudication of their claim, while excluding others. Such as in those circumstances where intervention is denied or it would defeat the jurisdiction of the District Court or additional extrinsic issues would be brought by the intervenor or if the intervention would delay or prejudice adjudication rights of the original parties. 3B Moores Federal Practice, P .2410 (4) 1980).

Therefore, we have the situation of the conflict between the circuits on tolling the statute of limitations. The problem stems from the interpretation as extension of American Pipe and the footnote in Eisen. Litigants, however, suffer because of lack of certainty and uniformity. There is squarely a conflict between the jurisdictions.

CONCLUSIONS

For these reasons this Court should grant a Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHARON MARGARET PAVLAK,	)	
Plaintiff-Appellant	)	
vs.	)	Nos.
	)	81-3109
JOHN R. CHURCH, individually and in his official capacity as Chief of Police for the City of Boise; FRANK E. RICHARDSON, CLINTON BAYS and J. M. BERRY, individually and in their official capacities as officers of the City of Boise Police Department; KENT GREENWELL and DAVID ALLEN, individually and in their respective official capacities as Communications Supervisor and Assistant Communications Supervisor of the	)	81-3122
	)	D.C. No.
	)	80-1209

Public Works Department of the)
City of Boise; RYAN ARMBRUSTER,)
individually and in his official)
capacity as Assistant City)
Attorney for the City of Boise;)
RICHARD EARDLEY, individually and) OPINION
in his official capacity a Mayor)
of the City of Boise; RALPH J.)
McADAMS, MARJORIE J. EWING, FRED)
L. KOPKE, BERNE K. JENSEN, JOY)
BUERSMEYER, and CORDELIA ONWEILER)
individually and in their)
official capacities as City)
Council member of the City of)
Boise; THE CITY OF BOISE, IDAHO,)
a municipal corporation, MYRL E.)
INGRAM, DENNIS BAIRD and JOHN)
PASCHKE, each individually and as)
agents and employees of MOUNTAIN)
STATES TELEPHONE AND TELEGRAPH)
COMPANY; and MOUNTAIN STATES)
TELEPHONE AND TELEGRAPH COMPANY,)

a Colorado corporation,)

Defendants-Appellees)

_____)

Appeal from the United States District Court for the District of Idaho

Honorable Ray McNichols, Chief Judge, United States District Judge, Presiding

Submitted: March 5, 1982

Before: KENNEDY, FARRIS, and NORRIS, Circuit Judges.

KENNEDY, Circuit Judge:

The question here is whether, after certification of a Rule 23(b)(3) class is denied, a plaintiff, who was a

member of the putative class, may claim that the statute of limitations was tolled pending determination of the certification motion so that she may file and independent suit. Plaintiff, the appellant here, contends that under American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), the statute of limitations is tolled to give her such an opportunity. We disagree. American Pipe permitted a toll of the statute of limitations for a class member who intervened in the action in which class certification was denied, and we conclude that its rationale cannot be extended to those who do not intervene, or try to do so. We therefore affirm.

Appellant's complaint alleged causes of action under 42 U.S.C. § 1983, 1985(3), and 1986, and 18 U.S.C. § 2520 (1976), as well as various pendent claims. She sought damages and other relief from alleged unauthorized surveillance of her

private telephone conversations. Policemen, other employees of the City of Boise, including the Mayor and City Council, and employees of Mountain States Telephone & Telegraph Co. were joined as defendants.

Other alleged victims of the illegal surveillance filed their own suits in federal district court. One of them, plaintiff Baker, filed a Rule 23(b) (3) class action against defendants in April 1977, and the putative class included appellant Pavlak. Certification was later denied on the ground that a numerous class did not exist, so that Fed. R. Civ. P. 23(a) (1) was not met. Appellant had petitioned the district court to participate as a class member in May 1979; but after the denial of class certification in August, 1979, she did not move to intervene despite the fact that the court's order denying certification allowed over a month to do

private telephone conversations. Policemen, other employees of the City of Boise, including the Mayor and City Council, and employees of Mountain States Telephone & Telegraph Co. were joined as defendants.

Other alleged victims of the illegal surveillance filed their own suits in federal district court. One of them, plaintiff Baker, filed a Rule 23(b) (3) class action against defendants in April 1977, and the putative class included appellant Pavlak. Certification was later denied on the ground that a numerous class did not exist, so that Fed. R. Civ. P. 23(a) (1) was not met. Appellant had petitioned the district court to participate as a class member in May 1979; but after the denial of class certification in August, 1979, she did not move to intervene despite the fact that the court's order denying certification allowed over a month to do

so. Plaintiff's complaint was not filed until August 11, 1980.

Both the city and telephone company defendants responded with motions for summary judgment on the ground that plaintiff's claims were barred by applicable statutes of limitations. The district judge granted summary judgment for defendants.

Since the statute of limitations upon which plaintiff relies, Idaho Code § 5-218, is three years, and the causes of action accrued at the latest, by April 1977, plaintiff's suit was time-barred unless the running of the statute of limitations was tolled pending the ruling on class certification.

In American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the State of Utah began an antitrust action. The suit was brought as a class action, with the State purporting to represent various

state and local government units. Upon a motion by the defendant, however, the district court held that the suit could not be maintained as class action because the class members were not numerous. Between the time that the original suit was filed and the denial of class certification, the statute of limitations had run, and the district court held that intervention of the putative class members was time-barred. The Supreme Court, affirming our court, held that the statute was tolled.

> [A]t least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all member is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

Id. at 552-53. A contrary rule would be unfair to putative class members who might have relied on their representation by the

class action plaintiff, id. at 551-52, and would inhibit judicial economy by encouraging potential class members to file protective intervention motions, id. at 553.

A threshold question of some difficulty is whether the tolling issue here is determined under Idaho or federal law. As a general rule, in actions filed under 42 U.S.C. S 1983, state statutes of limitation, including state rules of tolling, apply. Board of Regents v. Tomanio, 446 U.S. 478 (1980). Tomanio applied the state rule on whether the statute of limitations was tolled while "a litigant pursues a related, but independent cause of action," id. at 486; specifically, the question was whether the limitations period on plaintiff's constitutional claims was tolled while she resolved her state law interpretation claims in state court. The Court rejected the argument that applica-

tion of the state, no-tolling rule would be "inconsistent with the federal policy underlying the cause of action under consideration." Id. at 485, quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975). The Court found no federal policy underlying 42 U.S.C. S 1983 which called for application of a special federal rule. Id. at 487-92.[1] The issue before us, namely, whether state or federal rules of limitation apply when the reason for tolling arises from federal procedural policy, was not raised or addressed in Tomanio.

Federal procedural rules will modify the application of state limitations policy in federal question cases. E.g., Bomar v. Keyes, 162 F.2d 136, 140 (2d Cir. 1947) (filing of complaint under federal rules tolls statute despite contrary state law rule). This is justified by the need for uniformity. The Court in Tomanio

agreed that "uniformity" was "a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law." Id. at 489. Cf. Hanna v. Plumer, 380 U.S. 460, 469-74 (1965) (burden is on party who argues federal rules of civil procedure do not govern in diversity cases); Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 537-38 (1958) (state law not applied in face of countervailing federal procedural policy).

There is need for procedural uniformity in all class actions in federal courts and under this principle the federal rule, not the state law, governs the tolling issue relevant here. Cf. Chung v. Pomona Valley Community Hospital, No. 80-5072 (9th Cir. Feb 8, 1982), slip op. at 472 n.1 ("uniformity between identical federal claims in different states" found more important than "uniformity between often

only vaguely similar state and federal claims within a state"). The various considerations for our decision concern the "just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of disputes within the context of the federal procedural rules. This case presents us with the same sort of question the Supreme Court faced in American Pipe, namely, choice of "the rule most consistent with federal class action procedure." Id., 414 U.S. at 554. Although American Pipe concerned a cause of action under the federal antitrust laws, this was in our view an accidental feature of the case; the rule of tolling adopted there was an equitable incident of federal procedure. Our holding is supported by the Supreme Court's comment on American Pipe in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975):

(In American Pipe, there was a

substantial body of relevant federal procedural law to guide the decision to toll the limitation period and significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute.

Id. at 466. Under these principles, the issue of whether the American Pipe tolling rule applies here is one of federal procedural law.[2]

We turn to the question whether the statute of limitations was tolled for this appellant despite her failure to intervene in the action when class certification was denied. There are two principle reasons for tolling a limitations statute pending class certification. The first is fairness to any plaintiffs who may have refrained from filing suit or moving to intervene, expecting the case to proceed as a class suit. The second, closely related, justification for the tolling rule is that it serves judicial efficiency by eliminating the need to file intervention motions as a protective measure before the certification ruling is issued. Tolling the stat-

ute protects these interests by permitting plaintiffs to defer intervention motions until the class certification issue is decided. These are the principles underlying the rationale of American Pipe. Neither of these reasons, however, avails a plaintiff who fails to intervene but instead files an individual suit after class certification has been denied. If a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify. We think that in this instance the plaintiff should determine either to abide by the class certification motion, and file for intervention if it fails, or, on the other hand, commence an independent suit at the outset. Thus, the potential class member can either opt out and begin his own action within the relevant limitations period, or do nothing, in

which case he will be bound by the results of the litigation. If, as here, the latter course is taken and class certification is denied, principles of equity give the putative class members a chance to intervene in the suit, thereby approximating the status quo ante. These equitable principles do not extend to permit the plaintiff to take advantage of the alternative of a separate action after the limitations period has expired.[3]

Under this rationale, intervention after denial of class certification is encouraged. the suggestion by an appellant that intervention is cumbersome is undercut by an unchallenged factual finding that the class was not numerous. Where class certification was denied because the class was not numerous, then by definition post denial intervention is manageable and consistent with sound judicial administra-

tion. The American Pipe rule, therefore, does not support appellant's argument that she should be authorized to commence an independent suit without regard to limitations where class action status has been denied and no intervention is sought.

Appellant argues that the American Pipe tolling rule was extended by a footnote, in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974), to allow commencement of separate suits after class decertification. Eisen held that individual notice was required for all Rule 23(b)(3) class members who could be identified through reasonable effort, regardless of the expense this would cause to the plaintiff. One of the arguments made by the class action plaintiff in Eisen was that the class members would not opt out, since the statute of limitations had long since run on their claim, and therefore there was

no compelling reason to provide them with notice. The Supreme Court rejected this argument, noting:

> This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), which established that commence ment of a class action tolls the statute of limitations as to all members of the class.

We have sympathy with the court in Stull v. Bayard, 424 F. Supp. 937, 943 (S.D.N.Y. 1977), who found the brief footnote "puzzling". We do not read it, however, as effecting a drastic expansion of American Pipe beyond the solid equities of its factual underpinnings. The footnote seems to allow a class member who opts out at the time of receiving notice of the institution of a class action to commence his own separate suit. It does not, however, authorize tolling of the statute of limitations for

those who file separate actions at the time

of denial of class certification. That issue was not presented to the Court in Eisen.

Our resolution of this case follows that of the Second Circuit in Stull v. Bayard, 561 F.2d 429, 433 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978), aff'g, 424 F. Supp. 937, 941-43 (S.D.N.Y. 1977). The District of Columbia Circuit, in Wachovia Bank and Trust Co. v. National Student Marketing Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (alternative reason), cert. denied, 101 S. Ct. 3098 (1981), expressed a consistent view. We are aware of the contrary suggestion in Satterwhite v. City of Greenville, 578 F.2d 987, 997 (5th Cir. 1978), vacated for reconsideration, 445 U.S. 940 (1980). Even assuming the Fifth Circuit would reach the suggested conclusion were the issue squarely presented, we agree with the resolution reached by the Second Circuit, for reasons expressed in this opinion.

We do not hold that the principles expressed in American Pipe have no application to other factual circumstances than those before the Court. We do not necessarily reject, for example, the results reached in Haas v. Pittsburgh National Bank, 526 F.2d 1083, 1096-98 (3d Cir. 1975) (tolling applies to named plaintiffs later joining suit), and McCarthy v. Kliendienst, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977) (American Pipe applies where certification denied on ground of atypicality). We hold only that the rule in American Pipe does not apply to a situation where, as here, the policies explaining the case have no application.

AFFIRMED.

F O O T N O T E S

1/ For cases in which such "inconsistency" with federal substantive policy has been found to justify the development of a federal rule, see Occidental Life Insurance Co. of California v. Equal Employment Opportunity Commission, 432 U.S. 355, 366-73 (1977) (state statutes of limitations do not apply to EEOC actions enforcing Title VII claims); Chung v. Pomona Valley Community Hospital, No. 80-5072 (9th Cir. Feb. 8, 1982), slip po at 472-73 (federal continuing violation rule adopted to toll state statute); Cline v. Brussett, 661 F.2d 108, 110 (9th Circ. 1981) (accrual of a cause of action governed by federal law).

2/ Our Lexis research into Idaho law has disclosed no statute or court decision

on point, although Idaho contains a procedural rule identical to Fed. R. Civ. P. 23. We note that we therefore have no basis for identifying the Idaho law on this subject, should we conclude that it is relevant. We do believe that the courts of Idaho would adopt American Pipe, and our reading of it, as the better rule.

NORRIS, Circuit Judge:

I respectfully dissent because I cannot reconcile the majority's opinion with the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The majority excludes from the tolling rule of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) putative class members who file separate lawsuits rather than intervene after denial of class certification. While I agree with the majority that such a limitation furthers the goal of judicial efficiency, that should not end our inquiry. The Court in Eisen has told us that the American Pipe tolling rule benefits even class members who wish to file separate lawsuits.

I find the rule of Eisen--that commencement of a class action tolls the

statute of limitations for a class member who chooses to opt out and commence a separate action--controlling in this case. Like the class member in Eisen who opts out, Pavlak has elected to commence a separate action. Based on concerns for judicial efficiency, Pavlak should be entitled to a tolling rule as much as the Eisen class members, if not more so; at least Pavlak might never have filed a separate lawsuit had the class been certified.

The majority apparently relies on the distinction that in Eisen the separate actions would follow notice of class certification, whereas Pavlak's separate action follows the denial of class certification. See ante at 8. I see nothing of nothing of significance in this distinction.

Unlike the majority, I find nothing "puzzling" about the Eisen footnote.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Eberle, Berlin, Kading, Turnbow, and Gillespie, Chartered, P. O. Box 1368, Boise, Id. 83701, Counsel for Respondent and Mountain States Telephone and Telegraph Company, Myrl E. Ingram, Dennis Baird and John Paschke and Quane, Smith, Howard & Hull, P. O. Box 519, Boise, Id. 83701, Counsel for Defendants John R. Church, Frank E. Richardson, Clinton Bays, Kent Greenwell, Ryan Armbruster, Richard Eardley, Ralph J. McAdams, Marjorie J. Ewing, Fred L. Kopke, Berne K. Jensen, Joy Buersmeyer, Cordelia Onweiler and the City of Boise, Idaho. I further certify that all perties required to be served have been served.

_____

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Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-650

SHARON MARGARET PAVLAK, Petitioner

v.

JOHN R. CHURCH, et al

APPENDIX - Pages 53 to 57

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APPENDIX - Pages 53 to 57

The Supreme Court could not have spoken more clearly when it said that American Pipe established that "commencement of a class action tolls the applicable statute of limitations as to all members of the class". Eisen, 417 U.S. at 176 n. 13 (emphasis added). I presume the Court intended "all" to mean "all", not "some" class members, as the majority holds. "All" includes the putative class members in American Pipe who intervened after denial of class certification, the class members in Eisen who opt out after class certification and file separate actions, and putative class members like Pavlak who file separate actions after denial of class certification. It is not the Eisen footnote I find "puzzling"; what I find "puzzling" is the majority's inexplicable refusal to take the Supreme Court at its word.

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UNITED STATES DISTICT COURT FOR THE

DISTRICT COURT OF IDAHO

SHARON MARGARET PAVLAK,)

Plaintiff-Appellant)

vs.)

)

JOHN R. CHURCH, individually and) in his official capacity as Chief) of Police for the City of Boise;) D.C. No.
FRANK E. RICHARDSON, CLINTON BAYS) 80-1209

and J. M. BERRY, individually and)
in their official capacities as)
officers of the City of Boise)
Police Department; KENT GREENWELL)
and DAVID ALLEN, individually and)
in their respective official)
capacities as Communications)
Supervisor and Assistant)
Communications Supervisor of the)
Public Works Department of the)
City of Boise; RYAN ARMBRUSTER,)
individually and in his official)
capacity as Assistant City)
Attorney for the City of Boise;)
RICHARD EARDLEY, individually and) SUMMARY
in his official capacity as Mayor) JUDGMENT
of the City of Boise; RALPH J.)
McADAMS, MARJORIE J. EWING, FRED)
L. KOPKE, BERNE K. JENSEN, JOY)

BUERSMEYER, and CORDELIA ONWEILER) individually and in their) official capacities as City) Council member of the City of) Boise; THE CITY OF BOISE, IDAHO,) a municipal corporation, MYRL E.) INGRAM, DENNIS BAIRD and JOHN) PASCHKE, each individually and as) agents and employees of MOUNTAIN) STATES TELEPHONE AND TELEGRAPH) COMPANY; and MOUNTAIN STATES) TELEPHONE AND TELEGRAPH COMPANY,) a Colorado corporation,) Defendants-Appellees)

In accordance with the Order entered this date granting the Amended Motion to Dismiss Or, In the Alternative, For Summary Judgment filed on behalf of Defendants Mountain States Telephone and Telegraph Company, Myrl E. Ingram, Dennis

Baird and John Paschke (hereinafter "Mountain Bell"), it is hereby Ordered, Adjudged and Decreed that Summary Judgment is hereby entered in favor of Mountain Bell and against Plaintiff, dismissing Plaintiff's Compalint with prejudice. All parties shall bear their own costs.

DATED this 20th day of January, 1981.

/s/ RAY McNICHOLS

RAY McNICHOLS

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-650

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

SHARON MARGARET PAVLAK,

Petitioner-Appellant,

vs.

JOHN R. CHURCH, etc., et al.,

Respondent-Appellee.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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No. 82-650

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

SHARON MARGARET PAVLAK,

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QUESTION PRESENTED FOR REVIEW

The sole issue raised by Plaintiff-Petitioner's Petition for Writ of Certiorari is whether, under the class action tolling rule stated in American Pipe & Construction Company v. Utah, 414 U.S. 538 (1974), the commencement of a class action under Federal Rules of Civil Procedure 23 tolls the applicable statute of limitation for a putative class member who later files a separate lawsuit instead of moving to intervene in the initial lawsuit after the court has denied class certification.

LIST OF PARTIES

The parties to this proceeding are those listed on the caption of the case.

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13 Moores Federal Practice and Procedure, ¶817.21, p.SC 17-23 . . . 9

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THE OPINIONS BELOW

The official reports of the opinions issued by the lower courts in the case at bar are as follows:

Pavlak v. Church, Unpublished No. 80-1209, United States District Court for the District of Idaho (July 14, 1982).

Pavlak v. Church, et. al., 681 F.2d 617 (9th Cir. 1982).

No. 82-650

IN THE

SUPREME COURT OF THE UNITED STATES

SHARON MARGARET PAVLAK,

Petitioner-Appellant,

vs.

JOHN R. CHURCH, etc., et al.,

Respondent-Appellee.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. Nature of the Case.

On August 11, 1980 Plaintiff-Petitioner filed an individual action for damages against a number of defendants, including Mountain States Telephone and Telegraph Company and several of its employees

(hereinafter collectively designated "Mountain Bell"). The Complaint alleged violations of federal and state law arising out of the alleged interception and recording of telephone conversations on a particular telephone in the Boise, Idaho City Police Dispatch Center during an approximately one month period ending on March 28, 1977.

The district court found that Petitioner's Complaint was filed more than three years after her cause of action had accrued and granted summary judgment against Petitoner on the ground that the Idaho three year statute of limitations, Idaho Code § 5-218(1) was applicable and barred the action. In so holding, the district court rejected Petitoner's argument that, because she was a member of the putative class on whose behalf two earlier class actions were commenced, the statute of limitations was tolled during the pendency of those actions until the date class certification was denied. Instead, the district

court followed The District of Columbia and Second Circuit's reading of American Pipe and held that an earlier filed class action does not toll the limitation as to a putative class member who files an independent action rather than intervening in the earlier action after denial of class certification. See Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. den., 434 U.S. 1035 (1978); Wachovia Bank and Trust Company v. National Student Marketing Corp., 630 F.2d 342 (D.C Cir. 1980), cert. den., 452 U.S. 954 (1981).

The Ninth Circuit Court of Appeals affirmed the decision of the district court, specifically noting that the issue presented was one to be determined by the application of federal law and the principles and policies underlying the Federal Rules of Civil Procedure. Stated most simply, the Ninth Circuit held:

> "If a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify. We

> think that in this instance the plaintiff should determine either to abide by the class certification motion, and file for intervention if it fails, or, on the other hand, commence an independent suit at the outset. . . . If, as here, the latter course is taken and class certification is denied, principles of equity give the putative class members a chance to intervene in the suit, thereby approximating the status quo ante. These equitable principles do not extend to permit the plaintiff to take advantage of the alternative of a separate action after the limitations period has expired." 681 F.2d at 620.

Petitioner does not seek review of the lower court's determination that the cause of action accrued more than three years before the suit was commenced; nor does she contend that the applicable statute of limitations is other than the three year period provided in Idaho Code § 5-218(1). Thus, Petitioner concedes that her Complaint and cause of action are barred by the statute of limitations unless the tolling rule set forth in American Pipe is applicable to her case.

B. Statement of the Facts.

The issue presented by the Petition for Writ of Certiorari is procedural; therefore, the substantative facts which underlie the plaintiff's cause of action are irrelevant. Rather, only three facts are material at this juncture of the case: (1) Petitioner's Complaint was filed more than three years after her cause of action accrued; (2) Petitioner was a member of the putative class in two earlier actions based on the same factual circumstances and claims; and (3) Petitioner failed to intervene in either of the earlier actions after the trial court denied class certification despite having filed an affidavit and request to participate as a class member in those actions.

The Defendant-Respondents' position, which was adopted both by the district court and the Ninth Circuit Court of Appeals, is that Petitoner's cause of action accrued not later than April of 1977, that her separate action was filed more than three years later in August of

1980, and that Petitioner was not entitled to the benefits of any tolling provision. Therefore, her Complaint was barred.

ARGUMENT

The sole question now before the Court is whether this Court should undertake discretionary review by certiorari. It is the apparent position of the plaintiff-petitioner that the decision of the Ninth Circuit conflicts with the decision recently reached by the Fourth Circuit in Parker v. Crown, Cork and Seal Company, 677 F.2d 391 (4th Cir. 1982). While plaintiff-respondent, Mountain Bell, must concede the existence of a conflict between the Ninth Circuit's holding in the case at bar and the Fourth Circuit's Parker decision, there are several factors that militate against the grant of certiorari in this case.

Supreme Court Rule 17 provides in relevant part:

> ".1 A review on certiorari is not a matter of right, but of judicial discretion and will be

> granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.
>
> > "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ."

The first sentence of Supreme Court Rule 17 emphasizes that the grant of review by certiorari is a matter of discretion that will be afforded only where there are compelling reasons therefor. The mere existence of a conflict between the decisions of two circuits, in and of itself, is insufficient to justify the Court's exercise of its discretionary jurisdiction. Rather, Rule 17 is clear recognition of the often competing functions of the Supreme Court: On the one hand, the Supreme Court must account for and seek to achieve a uniform application of federal law in the

intermediate federal court system; on the other hand, the Supreme Court must contend with a burgeoning case load wherein petitions for certiorari routinely exceed five thousand per year.

Accordingly, notwithstanding a conflict in the decisions of two circuits, the Court has refused to accept certiorari where the issue is unlikely to reoccur because the conflict arose over a statute since repealed or where the conflict can be explained as being the result of variations in the factual patterns underlying each decision. Most importantly, the Court will refuse to grant certiorari where resolution of the conflict will not serve important procedural or substantive interests:

> "The nub of all these qualifications is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should

> promptly be dissolved." Harlan, Manning the Dikes, 13 Record YCBA 541, 552 (1958).

See also Stern, Denial of Certiorari Despite a Conflict, 66 Harv.L.Rev. 465, 472 (1953); Pettyman, Opposing Certiorari in the United States Supreme Court, 61 U.Va.L.Rev. 197 (1975); Frankfurter and Hart, The Business of the Supreme Court at October Term 1933, 48 Harv.L.Rev. 238, 268-269 (1939), which cogently notes: "One point may be stressed: the Court is interested in conflicts which impair uniformity of decision where uniformity is significant, conflicts which its decision in the particular case will remove." In recent years, the focus on the "significance of the issue" element has increased. Although there may be some dispute as to the reason for this change of focus, one explanation is provided in 13 Moore's Federal Practice, ¶ 817.21 at SC 17-23:

> "As the Court has increasingly devoted its efforts to the decision of constitutional issues, it has tended to accept cases for

> review by certiorari only when they present a conflict as to an important federal question." [footnote omitted]

The foregoing is not intended as an extensive review of the grounds for granting or denying certiorari. Such a review would require an analysis of the thousands of petitions that are filed with the Court each year. Moever, even such an analysis could not account for the discretionary aspect of the certiorari decision.

In the case at bar, this Court should exercise its discretion by denying certiorari for the following reasons: (1) The issue presented is not significant in that uniformity of decisions among the circuits is not necessary to protect litigants' substantive or procedural rights; (2) the issue is not ripe for Supreme Court review; and (3) the issue was fully briefed in the lower courts and the decision reached by the Ninth Circuit reflects a careful adjudiciation of the issue.

(1) The issue presented is not significant. As emphasized above, certiorari will be granted in a "conflict between the circuits" situation only where the legal issue presented is sufficiently serious that compelling reasons exist to justify the supervisory jurisdiction of the Supreme Court. Such seriousness and compelling reasons do not exist in this case.

Under this Court's decision in American Pipe and the Ninth Circuit's opinion in the case at bar, a putative class member is protected by being allowed to intervene in the primary action, notwithstanding expiration of the limitation period prior to denial of class certification. Similarly, under the Fourth Circuit's decision in Parker, a class litigant is protected by being permitted to file a separate action. Thus, although a conflict exists in the rationale underlying the decisions of the Ninth and Fourth Circuits, both decisions adequately protect the class litigants'

substantive rights following denial of class certification. The seriousness of the "conflict in the decisions" is therefore overstated by Petitioner.

In White v. New Hampshire Department of Employment Security, _____ U.S. _____, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), this Court held that a post-judgment request for attorney's fees under the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988 was not subject to the ten day timeliness provision of Fed.R.Civ.P. 59(e). The issue had been the subject of conflicting decisions of the Court of Appeals. See e.g., Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980). For present purposes, the significant portion of the Supreme Court's opinion states:

> "Section 1988 authorizes the award of attorney's fees 'in [the] discretion of the court.' We believe that this discretion will support a denial of fees in cases in which a post-judgment motion unfairly surprises or

> prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees." (Emphasis added). 71 L.Ed.2d at 333.

Subsequent to the decision in White v. New Hampshire, the district courts have in fact promulgated local rules govening the procedure and time limitations for filing attorney fee applications under § 1988. In light of numerous considerations, the procedures and time limits actually prescribed by such local rules are not uniform throughout the various circuits.

Similarly, in the case at bar, the procedure to be followed after class certification is denied is properly cognizable by local rules. In the limited procedural matter at issue, there is no need for uniformity across the country. The only relevant concern is that the interests of the litigants be protected. As discussed above, under either the Ninth or the Fourth Circuits' formulation,

subsequent to the denial of class certification the putative class members will be protected.

(2) The issue is not ripe for Supreme Court consideration. Under Supreme Court Rule 17, certiorari is only appropriate where the disagreement among the lower courts is one that should promptly be resolved. If the parameters of the disagreement between the circuits lacks concreteness, the issue is not ripe for review and certiorari should be denied. In both the Ninth and Fourth Circuits' decisions, the courts relied extensively upon policy grounds to support their rulings. Such reliance is implicit, if not explicitly stated, whenever a court judicially formulates a doctrine whose effect is to toll a statute of limitations. The policies underlying the Ninth Circuit's decision in the case at bar are well stated in the district court opinion which was affirmed by the Second Circuit in Stull v. Bayard, supra:

> "There is nowhere in the [American Pipe] opinion any suggestion that a separate

> independent action by a class member could be maintained. The opinion emphasized that its interpretation of the class action rule 23 was 'necessary to insure effectuation of the purposes of litigative efficiency and economy that the rule in its present form was designed to serve.' (414 U.S. at 556) It certainly would not effectuate litigative efficiency and economy to permit any number of separate, independent actions by class members on time barred claims. The separate opinion of Mr. Justice Blackman points out that the American Pipe principle will not unduly encourage the assertion of stale claims because these can only be asserted through intervention." 424 F.Supp. at 942-943.

This Court's decision in American Pipe also recognized the important policy of avoiding numerous separate lawsuits:

> "Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit, as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the

> class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties -- precisely the multiplicity of activity which Rule 23 was designed to avoid." 414 U.S. at 551

Although the result reached by the Ninth Circuit in the case at bar conflicts with the Fourth Circuit in Parker, the conflict exists due to a disagreement as to the weight to be given the applicable policy considerations. This court may ultimately be called upon to provide the final determination, however, the necessary weighing and balancing of policy cannot effectively be made until litigants have been allowed the opportunity to operate under the two divergent rules. Thus, the Supreme Court should deny certiorari in the instant case to await further judicial responses to the issue raised.

Moreover, under the specific factual and procedural history of this case, a decision by the Supreme Court at this point will in effect be advisory and not fully dispose of the case. Defendant-Respondent, Mountain Bell, has pending before the Ninth Circuit a Cross-Appeal contending that, even if the time was tolled during the pendency of the class certification dispute, the Plaintiff-Petitioner's Complaint was barred by a two year statute of limitation. The Ninth Circuit found it unnecessary to address the Cross-Appeal in light of its decision holding that the time was not tolled for the Petitioner's separate action. However, if this Court grants certiorari and reverses the Ninth Circuit, the reversal will not fully dispose of the procedural dispute. Rather, the case would have to be remanded to the Ninth Circuit for further consideration of the Cross-Appeal.

(3) The result reached by the Ninth Circuit is correct. Finally, without

exhaustively addressing the substantative merits of the issue, Defendant-Respondent respectfully submits that the Ninth Circuit's decision is consistent with the view of the majority of courts which have squarely been confronted with the issue raised in the petition for certiorari. Those courts have held that American Pipe provides no protection from the running of the statute of limitations where a class member files a separate suit rather than intervening in a pending action after denial of class certification in such action. Reference is again made to the persuasive analysis in Stull v. Bayard which was adopted by the Ninth Circuit in the case at bar:

> "The Supreme Court [in American Pipe] then affirmed, saying (among other things):
>
> > 'We hold that in this posture, at least where class action has been denied solely because a failure to demonstrate that the "class is so numerous that joinder of all members is

> impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.'

"The Supreme Court went out of its way to specify that the limitations statute was tolled by a class action only as to those purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

"[Plaintiff Stull] is not within the American Pipe Rule of tolling. He did not move (timely or not) to intervene in the then pending action after class action status had been denied to that action. [Plaintiff] went counter to and defied the American Pipe principle by commencing a separate and independent action, thus increasing the volume of federal litigation and defeating the economy and efficiency which it was the object of the present class action Rule 23 to bring about." 424 F.Supp. at 942-943.

Similarly, 3B Moore's Federal Practice 1975 Supplement, at page 155, concludes regarding the effect of American Pipe: "On balance, then, it seems likely that the class member may not file an independent suit after the claim is time barred."

Mountain Bell respectfully submits that the decision of the Ninth Circuit, relying on the Second Circuit's decision in Stull v. Bayard, is the more reasoned approach to resolution of the problem and more carefully accounts for the policy considerations that must govern the Federal Rules of Procedure.

CONCLUSION

In recent years, the Supreme Court has faced an increasing burden of sifting through innumerable petitions for certiorari. While, in the past, a decision of a federal circuit court which conflicted with a decision of another circuit court may have provided a sufficient basis to justify the grant of certiorari, the reality of the expanding case load has required

this Court to more carefully exercise its discretionary jurisdiction. Specifically, notwithstanding a conflict in circuit court opinions, certiorari will be granted only where the issue presented is substantial and involves a compelling need for the supervisory control of the Court. The case at bar simply does not fit that pattern.

Even conceding that the Ninth Circuit's decision conflicts with that of the Fourth Circuit, the issue presented is insubstantial in that litigants' substantive rights will be protected under either procedural approach; and either approach can be adopted by local rule. Consequently, the need for nation-wide uniformity in federal practice and procedure is absent.

Moreover, the resolution of this issue is not mandated by the clear terms of any one of the Federal Rules of Civil Procedure. Rather, the result is dictated by analyzing the policies which underly the federal rules,

including the judiciary's justifiable reluctance to engender additional litigation. An ultimate decision on this issue by the Supreme Court is premature and should await the results of actual practice under the two approaches.

Finally, the respondents of course submit that the Ninth Circuit's approach is correct. This assertion is, however, based on more than a mere desire for affirmance: The Ninth Circuit's approach is well-reasoned and appropriately accounts for the policies noted above.

Accordingly, Defendant-Respondent respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of December, 1982, three true and correct copies of the foregoing RESPONSE BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon the following attorneys by depositing the same in the United States mail, postage prepaid:

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